

# MUNICIPAL OBLIGATIONS UNDER THE FAIR HOUSING ACT

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Texas City Attorneys Association  
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# BACKGROUND

- Passed by Congress – April 10, 1968
    - Signed by President Johnson – April 11, 1968
    - Amended in 1974 and 1988.
  - Purpose is to provide, within constitutional limitations, for fair housing throughout the United States
    - Prohibits discrimination in the sale or rental of housing.
    - Requires the government to take actions to achieve integration.
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# PROTECTED CLASSES

- Race
  - National Origin
  - Color
  - Religion
  - Sex
  - Familial Status
  - Disability
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# PROHIBITS

- Refuse to sell or rent after making of a bona fide offer.
  - Refuse to negotiate for the sale or rental of a dwelling.
  - Impose different terms, conditions, or privileges related to the
    - provision of services or facilities in connection with a dwelling OR
    - sale or rental of a dwelling.
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# PROHIBITS

- Make, print, or publish (or cause to be made, printed, or published)
  - any notice, statement, or advertisement,
  - with respect to the sale or rental of a dwelling
  - that indicates any preference, limitation, or discrimination.
- Actions that otherwise make a dwelling unavailable.

# PROHIBITS

- Falsely represent that a dwelling is not available when the dwelling is in fact so available.
  - (For profit) induce or attempt to induce any person to sell or rent any dwelling by representing the entry or prospective entry into the neighborhood by individuals of a particular protected class.
  - Retaliation when an individual exercises his or her rights under the Act or assists another with exercising his or her rights.
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# DISCRIMINATION BASED ON DISABILITY

- Applies to an individual with a disability, an individual that lives with or is associated with an individual with a disability, and an individual regarded as having a disability
- Protections Specific to Individuals with Disabilities
  - Reasonable accommodations: change or exception to a rule or policy.
  - Reasonable modifications: alteration to the dwelling paid for by the occupant.
  - Certain design and construction standards: multifamily dwellings first occupied after March 1991

# REASONABLE ACCOMMODATIONS

- The accommodation may be necessary to afford the individual with a disability an equal opportunity to use and enjoy the dwelling.
- Only unreasonable if the change/exception
  - creates an undue financial/administrative burden OR
  - fundamentally alters the nature of a jurisdiction's zoning and land use regulations
- Guidance: Joint Statement by HUD and DOJ (dated May, 2004)

# ENFORCEMENT

- Administrative enforcement by HUD
    - Must file complaint within 1 year
  - Court enforcement by HUD
    - Filed by the DOJ
  - Private cause of action
    - Must file lawsuit within 2 years
    - Do NOT need to file a complaint with HUD before filing a lawsuit.
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# PENALTIES

- Actual and punitive damages
- Injunctive relief
- Court may allow the prevailing party, other than the federal government, reasonable attorney's fees and costs
- DOJ litigation: Civil penalties.
- Jeopardize federal funding

# CAUSES OF ACTION AGAINST A CITY

- Failure to grant a reasonable accommodation.
    - Outright denial
    - Unreasonable delay
  - Disparate treatment: different treatment because the person is a member of a protected class
  - Disparate impact: facially neutral policy or regulation that has a disparate adverse impact on members of a protected class
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# CASES

- City of Edmonds v. Oxford House, 514 U.S. 725 (1995).
  - Applicability of FHA
- Tsombanidis v. West Haven Fire Department, 352 F.3d 565 (2<sup>nd</sup> Cir. 2003).
  - Different treatment
  - Reasonable accommodation
- Avenue 6E Investments, LLC, and Saguaro Desert Land, Inc. v. City of Yuma,
  - Different Treatment
  - Disparate Impact

# CASES

- Oxford House, Inc. v. City of Baton Rouge, 932 F.Supp.2d 683 (M.D. Louisiana 2013).
  - Different treatment
  - Reasonable accommodation
  - Retaliation
- Community Housing Trust v. Dept. of Consumer and Regulatory Affairs, 257 F.Supp.2d 208 (D.C. Cir. 2003).
  - Different treatment

# CASES

- Inclusive Communities Project, Inc. v. TDHCA
  - 135 S.Ct. 2507 (2015)
    - Disparate impact claims are cognizable under the FHA.
    - Establishes test
  - 3:08-CV-0546-D (August 26, 2016)
    - On remand, the district court applied the test established by the Supreme Court.
    - Dismissed the disparate impact claim because plaintiff failed to prove a prima facie case.

# AFFIRMATIVELY FURTHER FAIR HOUSING

- Means to take steps to increase integration and decrease segregation
    - Address discrimination within the jurisdiction.
    - Provide opportunities to integrate housing.
    - Promote fair housing choice.
  - Requires a jurisdiction to
    - Conduct an analysis of impediments (barriers) to fair housing choice.
    - Take meaningful steps to address the identified impediments.
    - Document the analysis, the steps, and the results.
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# AFFIRMATIVELY FURTHER FAIR HOUSING

- Applies to jurisdictions that receive funding from the U.S. Housing and Urban Development
  - Executive Order No. 12892 (1994 President Clinton)
  - Federal regulations
    - 24 C.F.R. Sections 5.150 through 5.168
    - 24 C.F.R. Part 91
  - Guidance: Fair Housing Planning Guide (See HUD website)
- Must certify to affirmatively further fair housing before receiving funds

# CASES

- Otero v. New York City Housing Authority, 484 F.2d 1122 (2nd Cir. 1973).
  - Obligation to affirmatively further fair housing extends to agencies administering federally-assisted housing programs.
  - Discusses purpose of racial integration.
- NAACP v. Sec'y of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987).
  - Federal court has jurisdiction to review claims that the Secretary of HUD failed to administer programs in a manner that affirmatively furthers fair housing.

# FAIR HOUSING CHOICE

- Information, opportunity, and options to live where an individual/family chooses without unlawful discrimination and others barriers related to race, color, religion, sex, familial status, national origin, or disability.
  - Actual choice: existence of realistic housing options;
  - Protected choice: housing that can be accessed without discrimination; and
  - Enabled choice: realistic access to sufficient information regarding options to make an informed choice.
- For an individual with a disability, includes access to accessible housing and housing in the most integrated setting appropriate to an individual's needs.

# ASSESSMENT OF FAIR HOUSING

- Abbreviated AFH
- Formerly known as the “analysis of impediments.”
- Must submit a new AFH at least once every 5 years.
- Must give the public reasonable opportunities to get involved in developing the AFH.

# REVIEW OF AFH

- HUD reviews and accepts the AFH.
  - Acceptance only applies to HUD's administration of the program – not substantive compliance with federal law.
- HUD can refuse to accept the AFH if it provides notice of non-acceptance before the 60th day after HUD receives the AFH.
  - Notice is made in writing, explains why AFH was not accepted, and includes actions needed to resolve non-acceptance.
  - Reasons HUD will not accept
    - AFH is inconsistent with fair housing or civil rights requirements
    - AFH is substantially incomplete

# AFH COMPONENTS

- Summary of fair housing issues and capacity.
  - Data analysis.
    - Identify integration and segregation patterns and trends
    - Identify racially or ethnically concentrated areas of poverty
    - Identify significant disparities in access to opportunity for any protected class
    - Identify disproportionate housing needs for any protected class
  - Assessment of fair housing issues.
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# AFH COMPONENTS

- Fair housing priorities and goals.
    - Identify and discuss the fair housing issues.
    - Identify significant contributing factors, prioritize such factors, and justify the prioritization of the contributing factors.
    - Set goals for overcoming the effects of contributing factors as prioritized above.
  - Strategies and actions.
  - Summary of community participation
  - Review of progress achieved since submission of a prior assessment.
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# ADMINISTRATIVE ENFORCEMENT

- TX Low Income Housing Information Service & TX Appleseed vs. Texas
  - Allegation
    - State violated Fair Housing Act when administering certain Hurricane Community Development Block Grant Funds.
  - Result: Conciliation Agreement
    - Update the State's Analysis of Impediments.
    - Training and reporting related to AFFH
    - Allocating funds
    - Paid \$120,000 in attorney fees

# FALSE CLAIMS ACT (FCA)

- Federal cause of action 31 U.S.C. § 3729
- Elements:
  - made a claim;
  - to the federal government;
  - that is false or fraudulent;
  - knowing it was false; and
  - sought payment from the federal government.

# FALSE CLAIMS ACT

- “Knowingly” means has
  - actual knowledge of the information;
  - acts in deliberate ignorance of the truth or falsity of the information; or
  - acts in reckless disregard of the truth or falsity of the information.
- Penalties:
  - Civil penalties (\$5,000 to \$10,000)
  - 3 times the amount of damages sustained by the federal government

# U.S. EX REL. ANTI-DISCRIMINATION CENTER V. WESTCHESTER COUNTY

- Issue:
  - Did County fail to analyze impediments based on race?
- 495 F.Supp.2d 375 (S.D.N.Y. July 13, 2007)
  - Describes the elements and pleading requirements.
- 668 F.Supp.2d 548 (S.D.N.Y. Feb. 24, 2009)
  - One fact issue: Did County knowingly submit false certifications and payment requests?
- 712 F.3d 761 (2<sup>nd</sup> Cir. 2013)
  - Violated consent decree related to a veto of "source-of-income" legislation.

# U.S. EX REL. WASHINGTON v. CITY OF NEW ORLEANS

- 2012 WL 956497 (E.D. LA March 19, 2012) (Civil Action No. 09-7244).
- Claim based on Analysis of Impediments the City of New Orleans was required to submit.
- Plaintiff relied upon *Westchester County*.
  - District Court dismissed because factually distinguishable from *Westchester County*.

QUESTIONS?

